

CIVIL CASE NO. 3:09cv65

Defendants.

ORDER

On June 3, 2009, the Magistrate Judge filed a Memorandum and Recommendation [Doc. 22] in which he recommended granting the motion to dismiss. The parties were advised that any objections to the Magistrate

Judge's conclusions and recommendations were to be filed in writing within ten days of service of the Recommendation and that failure to file objections to the Memorandum and Recommendation would preclude the parties from raising any objection on appeal. [Doc. 22, at 4-5]. The period within which to file objections expired on June 22, 2009 and no written objections to the Memorandum and Recommendation have been filed.

The Court concludes that the Magistrate Judge's recommendation is supported by the record and the law. Accordingly, the Court hereby accepts the Magistrate Judge's Recommendation that the motion to dismiss the party defendant D. R. Horton, Inc.-Charlotte Division be granted. The caption of the case has been amended to reflect this dismissal.

There remains, however, a discrepancy in the pleadings. On February 25, 2009, the Plaintiff moved, with the consent of the Defendant D. R. Horton, Inc., to amend his Complaint in order to add an additional defendant, Carolina Framers, Inc. [Doc. 8]. The motion was granted [Doc. 12] and the Amended Complaint was filed on February 26, 2009 naming Carolina Framers, Inc. as a defendant. [Doc. 11]. On May 29, 2009, the Plaintiff filed proof of service showing that Carolina Framers, Inc. was

served on April 13, 2009. [Doc. 20-2]. The entity has not appeared in the action.

Some of the pleadings in the action have included Carolina Framers, Inc. as a defendant; however, when D. R. Horton, Inc. filed an Answer to the Amended Complaint on March 9, 2009, it deleted Carolina Framers, Inc. as a defendant in the caption but named it as a third-party defendant. [Doc. 15]. This was presumably because Carolina Framers, Inc. Had not yet been served. Thereafter the Plaintiff filed a Reply to Defendants D. R. Horton, Inc. and D. R. Horton, Inc.-Charlotte Division which named Carolina Framers, Inc. as a party defendant as well as a third-party defendant. [Doc. 16]. Nonetheless, subsequent pleadings have omitted Carolina Framers, Inc. as a party defendant. Since Carolina Framers, Inc. has now been served it is a party defendant. The claim of Defendant D.H. Horton, Inc. against Defendant Carolina Framers, Inc. is therefore properly deemed a crossclaim, and Carolina Framers, Inc. will not be treated any further as a third party defendant. The caption has been amended to reflect this.

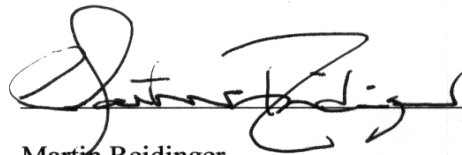
It is also noted that Carolina Framers, Inc. has been served by both the Plaintiff and D. R. Horton, Inc. but has not appeared in the action. Yet,

neither has moved for entry of default.

IT IS, THEREFORE, ORDERED that the Defendant D. R. Horton, Inc.'s Revised Motion to Dismiss. [Doc. 17] is hereby **GRANTED**.

IT IS FURTHER ORDERED that the caption of the case is hereby **AMENDED** to reflect the alignment of the parties.

Signed: August 6, 2009


Martin Reidinger
United States District Judge

